UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

Bryana Bible, individually and
on behalf of the proposed classes,

Plaintiff,

v.

United Student Aid Funds, Inc.,

Defendant.

Case No. 1:13-cv-00575-TWP-TAB

MEMORANDUM IN SUPPORT OF JOINT MOTION FOR PRELIMINARY APPROVAL OF THE PROPOSED CLASS ACTION SETTLEMENT

INTRODUCTION

The parties in this long-running litigation have reached a class-wide settlement on behalf of the more than 35,000 student loan borrowers who were charged collection costs that Plaintiff Bryana Bible ("Ms. Bible" or "Plaintiff") alleges should not have been charged under the terms of the contracts binding those borrowers and Defendant United Student Aid Funds, Inc. ("Defendant" or "USAF"). The settlement provides for significant monetary relief to the proposed class of borrowers: a common fund of twenty-three million dollars ($23,000,000).

Additionally, Defendant has agreed to meaningful injunctive relief. Specifically, the settlement provides that Defendant will not engage in the practice which engendered this litigation: i.e., it will not impose collection costs on first-time defaulted student loan borrowers who enter into rehabilitation agreements within sixty (60) days after the claim purchase date for the defaulted loan, and who comply with those agreements, unless and until such time as any court of competent jurisdiction or agency, such as the United States Department of Education (the "Department"), issues a ruling or opinion directly or indirectly authorizing the collection costs at issue in this case.

The relief provided through the parties' settlement is particularly notable given the stage of litigation. To be sure, the settlement is the product of hard-fought litigation, including motion practice at the pleadings stage, appellate practice that commenced in 2014 and did not conclude until the denial of Defendant's petition for a writ of certiorari by the United States Supreme Court in 2016, and extensive discovery meet and confers regarding electronically stored information. However, Plaintiff had not yet moved for class certification at the time of settlement nor prevailed on the merits of her breach of contract claim or claim under the Racketeer Influenced Corrupt Organizations Act ("RICO"). Despite this and in consideration of merits of Plaintiff's claims, as well as the risks attendant with continued litigation, after arms-length negotiations, including a full-day mediation with a well-respected private mediator where both parties were represented by experienced and informed class action attorneys, the parties were able to arrive at the instant settlement.

For the reasons stated above and as discussed in further detail herein, the settlement is fair, reasonable, and adequate and warrants approval under Rule 23. Accordingly, the parties respectfully request that the Court: (1) preliminarily approve the proposed Settlement, (2) certify the Settlement Class for settlement purposes only, (3) appoint Plaintiff as the Class Representative, (4) appoint Plaintiff's counsel as Class Counsel, (5) direct notice to be distributed to the Settlement Class, and (6) schedule a final approval hearing.

BACKGROUND

I. PLAINTIFF'S ALLEGATIONS

This case involves student loans under the Higher Education Act's ("HEA") Federal Family Education Loan Program ("FFELP"). Under FFELP, private lenders make loans to students attending post-secondary institutions. *College Loan Corp. v. SLM Corp.*, 396 F.3d 588, 590 (4th Cir. 2004) (explaining structure of FFELP). The loans are guaranteed by entities known as guarantee agencies, such as Defendant. *Id.* If a borrower defaults on the loan, the loan is transferred to the guarantee agency, who then pays the private lender for the debt and then itself seeks payment from the borrower.[1] *Bible v. United Student Aid Funds, Inc.*, 799 F.3d 633, 641 (7th Cir.), *reh'g denied*, 807 F.3d 839 (7th Cir. 2015), and *cert. denied*, 136 S. Ct. 1607, (2016).

Plaintiff took out a FFELP loan in 2006, which loan was governed by a form contract, i.e., the Master Promissory Note ("MPN" or "parties' contract"). (ECF No. 38-3.) Defendant is named on the top of the first page of the MPN in the section titled "Guarantor, Program, or Lender Identification." (*Id.* at 2.) The MPN states the terms of the loan explicitly and through incorporation. (*Id.*) Most relevant here, the loan incorporates the Higher Education Act, which, in Plaintiff's view, does not permit the imposition of collection costs when a borrower who is in default for the first time agrees to rehabilitate a defaulted loan within sixty days of the notice of default. *Bible*, 799 F.3d at 644. Defendant disagrees with this reading of the Higher Education Act.

In 2012, Citibank found Plaintiff to be in default on her loan payments. *Bible*, 799 F.3d at 642. The loan was transferred to Defendant who, through its debt-collection agent, then sent Plaintiff a form letter offering her the chance to rehabilitate her loan. (ECF No. 38-4.) The parties came to an agreement on rehabilitation and Defendant, through its agent, then mailed Plaintiff a form agreement (the "Rehabilitation Agreement"), which represented that Plaintiff's collection costs were $0.00. Plaintiff promptly signed and returned the Agreement within the allowed 60-day period. (ECF 38-5.) Plaintiff timely made all of the payments required under her

[1] Following the passage of the Health Care and Education Reconciliation Act of 2010, the FFELP program was barred from issuing new loans. 111th Congress, Public Law 152 §§ 2201-2205; 20 U.S.C. § 1071(d). All loans originated prior to July 1, 2010, however, continue to be governed under the structure described above.

Rehabilitation Agreement. *Bible*, 799 F.3d at 643. Defendant nevertheless then imposed over $4,000 in collection costs on her. *Id*.

Accordingly, on April 8, 2013, Plaintiff filed the instant lawsuit on behalf of herself and similarly situated borrowers, alleging that Defendant breached the parties' contract by imposing costs in contravention of the HEA and that Defendant violated RICO by inducing Plaintiff to rehabilitate her loan despite knowing it would impose collection costs regardless. (ECF No. 1.)

II. DEFENDANT'S DEFENSES AT THE PLEADING STAGE AND RELATED MOTION PRACTICE

Defendant vigorously denies that Plaintiff's claims have merit. And, following service of the Complaint, Defendant moved to dismiss this action in its entirety on July 1, 2013. (ECF No. 31.) In response, Plaintiff filed the First Amended Complaint ("FAC") on July 29, 2013, amplifying her factual allegations but maintaining the same causes of action plead in the initial complaint. (ECF No. 38.) Again, Defendant moved to dismiss and, separately, to strike portion of the FAC on August 29, 2013. (ECF Nos. 45, 47.) Briefing on the motions concluded on October 14, 2013, and this Court held oral argument on February 12, 2014. (ECF No. 62.)

On March 14, 2014, this Court denied Defendant's motion to strike, but granted Defendant's motion to dismiss and entered final judgment against Plaintiff. (ECF Nos. 68, 69.) Plaintiff appealed to the Seventh Circuit on April 14, 2014. (ECF No. 73); *Bible v. United Student Aid Funds, Inc.*, Case No. 14-1806, ECF No. 1 (7th Cir. Apr. 14, 2014)).

Following briefing, the Court of Appeals held oral argument on October 2, 2014. (App. ECF No. 27.) Then, on May 21, 2015, at the request of the Court of Appeals, the Department filed an amicus brief stating its position that collection costs are not allowed where a borrower in default for the first time agrees to rehabilitation within the sixty-day window, as did Plaintiff. (App. ECF No. 33.) The parties filed responses to the same shortly thereafter. (App. ECF Nos.

37, 38.)[2]

On August 18, 2015, a divided panel of the Court of Appeals for the Seventh Circuit reversed this Court's ruling, holding that Plaintiff had stated a claim for breach of contract and under RICO. 799 F.3d 633. Defendant then petitioned for rehearing *en banc*, Plaintiff opposed the same, and the petition was denied on October 5, 2015. 807 F.3d 839.

Defendant then moved the Court of Appeals for a stay of the issuance of its mandate pending Defendant's filing and the disposition of its intended petition for a writ of certiorari to the United States Supreme Court. (App. ECF Nos. 65, 66.) The Court of Appeals denied the same and issued the mandate on October 22, 2015. (App. ECF No. 68-69.) On January 4, 2016, Defendant filed its petition for a writ of certiorari to the United States Supreme Court. (Sup. Ct. Docket (No. 15-861), entry of Jan. 4, 2016.) Plaintiff filed her opposition on March 7, 2016. (*Id.*, docket entry of March 7, 2016.) On May 16, 2016, the Supreme Court denied Defendant's petition. 136 S. Ct. 1607.

The parties then met to discuss the case schedule, develop the case management report, and initiate discussions about electronically stored information ("ESI"). (Declaration of Anna P. Prakash ("Prakash Decl."), ¶ 4.) Discovery commenced shortly thereafter, and Defendant filed its Answer on April 7, 2016. (*Id.*; ECF No. 112.) During discovery, Defendant produced written responses to Plaintiff's document requests, interrogatories, and requests for admissions, and

[2] Shortly thereafter, on July 10, 2015, the Department issued a "Dear Colleague Letter," stating the same position it took in this litigation as to the propriety of collection costs. Gen-15-14, available at https://ifap.ed.gov/dpcletters/attachments/GEN1514.pdf. In response, Defendant initiated a lawsuit against the Department in the United States District Court for the District of Columbia. *See United Student Aid Funds, Inc. v. King*, No. 15-CV-01137 (D.D.C., July 16, 2015). Defendant's lawsuit questions the Dear Colleague Letter and guidance therein, alleging, *inter alia*, that the Department failed to follow proper notice and comment procedures. *Id.*, ECF No. 1. The district court in that case denied the Department's motion to dismiss and summary judgment briefing is expected in the first half of 2017. *Id.*, ECF Nos. 18, 22.

produced documents such as Plaintiff's loan file and various written policies utilized by Defendant. (Prakash Dec. ¶ 5.) The parties also conducted lengthy meet and confers regarding ESI and the various electronic databases housing potentially relevant information on the loans at issue in the litigation. (*Id.*, ¶ 6.)

In the summer of 2016, the parties agreed to attend mediation in this case. (*Id.*, ¶ 7.) Prior to mediation and as part of an agreed-upon exchange of information necessary in order to allow Plaintiff to more thoroughly evaluate the class claims, including potential damages, Defendant, on August 31, 2016, produced a spreadsheet with specific and detailed information regarding each borrower within the proposed classes (the "Rehab Data Spreadsheet"). (*Id.*) Among other things, the Rehab Data Spreadsheet listed the total amount of collection costs assessed on each loan that fell within the proposed class definitions and the current status of the loan (for example, whether it was in repayment, whether it had been consolidated, and whether the borrower had re-defaulted on the loan). (*Id.*) Over the next month, the parties engaged in several discussions so that Class Counsel could fully understand the produced data. (*Id.*)

The parties attended mediation on September 29, 2016, with retired United States District Court Judge Wayne Andersen of JAMS in Chicago. (*Id.*, ¶ 8.) Mediation was successful, and the parties executed an agreement as to core settlement terms that day, conditioned upon agreement to final terms and approval by this Court. (*Id.*, ¶ 8.) At the parties' request, this action was then stayed so that the parties could focus their time and resources on negotiating and executing a full settlement agreement. (ECF No. 122.) On January 27, 2017, after nearly four months of continued arms-length negotiations, the parties executed a full settlement agreement. (Prakash Decl., ¶ 8; Settlement Agreement.)[3]

III. SETTLEMENT CLASS AND LOAN GROUPS

The proposed Settlement Class consists of the approximately 35,516 individuals (who, together, hold 90,687 loans). (Prakash Decl., ¶ 9.) Defendant has identified those 35,516 individuals as:

- All persons who entered into a loan agreement that is silent on or allows collection costs only to the extent allowed under the Higher Education Act; and
- Who, subsequently, within 60 days after the claim purchase date for the defaulted loan, entered into an agreement substantially the same as the Rehabilitation Agreement agreed to by Plaintiff; and
- Who completed rehabilitation by making at least nine of the ten scheduled payments during the agreed upon period of ten consecutive months; and
- On whom Defendant subsequently imposed collection costs at any time from April 8, 2007 to July 31, 2015.

(Settlement Agreement, ¶ 43.)[4] These Settlement Class Members, provided that they do not validly and timely exclude themselves from the settlement as discussed below, will release any and all claims that are alleged in the First Amended Complaint in this case, with such release applying to claims accruing at any point between April 8, 2007 through July 31, 2015. (*Id.*, ¶ 67.)

The parties recognize that due to the nature of student loan debt and as a result of a class period stretching more than nine years, the 90,687 loans covered under the settlement (the "Loans At Issue") are in various stages of repayment. To explain, once a borrower in default

[3] The settlement agreement is attached as Exhibit 1 to the Prakash Dec. All other exhibits cited herein are also attached to the Prakash Decl.

[4] As to the relevance of "claim purchase date," the parties note that, upon purchase of the defaulted loan by USA Funds, an automated process immediately generates a notice letter, which then gets immediately mailed to the defaulted borrower, informing him or her of the opportunity to enter into a Rehabilitation Agreement. (Declaration of Daniel Hurt ("Hurt Decl."), ¶ 7.) The Hurt Decl. is Exhibit D to the Settlement Agreement.

agrees to rehabilitation, they are obligated to make nine agreed upon monthly payments within ten consecutive months. 34 C.F.R. § 682.405. Once that happens, collection costs that have been added to the loan are capitalized (i.e., added to the principal balance) and the loan is sold to a new lender with that new balance. (Prakash Decl., ¶ 11.) Following the sale, some of these borrowers chose to consolidate loans, which generally resulted in the Department becoming the lender. (*Id.*) Yet other borrowers defaulted again after rehabilitation, in which case Defendant again became the lender. (*Id.*) Finally, some borrowers paid off their loan in full. (*Id.*)

Accordingly, the parties have identified four "Loan Groups" each of which has its own recovery distribution method. (Settlement Agreement, ¶¶ 26-29.) The Loan Groups are:

> Group A Loan: Any loan listed on the Rehab Data Spreadsheet that, as of the date the Class List is prepared, is held by Defendant as guarantor due to post-rehabilitation default.
>
> Group B Loan: Any loan listed on the Rehab Data Spreadsheet that, as of the date the Class List is prepared, is held by a Post-Rehabilitation Lender that is not the Department.
>
> Group C Loan: Any loan listed on the Rehab Data Spreadsheet that, as of the date the Class List is prepared, has been consolidated or subrogated to the Department and not paid in full.
>
> Group D Loan: Any loan listed on the Rehab Data Spreadsheet that, as of the date the Class List is prepared, has been paid in full.

(*Id.*) For loans in Groups A-C (where borrowers still owe a balance on their loans), the parties' settlement agreement provides that settlement payments will be made via an account credit. (Settlement Agreement, ¶ 49(i).) Because the loans in Group B are not currently held by Defendant, the lenders who hold those loan accounts, or the servicers on those lenders' behalf—including the Department—have committed to allow the application of credits to accounts they hold should the Court grant final approval of the parties' settlement. (Prakash Decl., ¶ 12.) Similarly, the Department, which holds the loans in Group C, has indicated that it is able to apply credits to those loans. (*Id.*) Because loans in Group D have been paid in full, the settlement payments will be made directly to the Borrower via check. (Settlement Agreement, ¶ 49(ii).) Importantly, the division of the Loans At Issue into the groups detailed above in no way affects the amount of the distribution received by an individual Settlement Class Member but rather simply determines the method of distribution (i.e., account credit or check) based on whether an entity currently holds the affected loan or the loan has been paid off. (*Id.* ¶¶ 49-50.)

IV. THE SETTLEMENT AGREEMENT

A. Overview of Terms

In consideration for the release of the Settlement Class Members' claims, Defendant has agreed to provide significant monetary and non-monetary (i.e., injunctive) relief.

As to the monetary relief, Defendant will pay twenty-three million dollars ($23,000,000) into a common fund. (Prakash Decl., Ex 1, ¶ 25.) In no circumstance will any portion of this fund revert to the Defendant. (*Id.*) Rather, after deduction of any Court-approved attorneys' fees, expenses, and class representative service award, the entire remaining fund (the "Net Settlement Fund") will be distributed to Settlement Class Members as follows:

Settlement Class Members who do not timely and validly exclude themselves from the settlement will receive credits for any loans they have in Groups A-C. (*Id.*, ¶ 49(i).) Notably, the lenders currently holding such loans and the servicers on behalf of those lenders, as well as the Department, have committed to apply credits such that they reduce principal balances, closely aligning with the alleged harm in this case, i.e., the imposition of collection costs which capitalized and thereby become part and parcel of the principal balance. (Prakash Decl., ¶ 13; Settlement Agreement, ¶ 49(i).) The Settlement Class Members who do not timely and validly exclude themselves from the settlement and who send in a valid Claim Form within the sixty

(60) day notice period will receive a check for any loans they have in Group D. (Settlement Agreement, ¶ 49(ii).) The claim form process for persons in Group D is being utilized solely for the purpose of verifying identities and addresses for those Settlement Class Members for whom Defendant and subsequent lenders are uncertain of a current address. Claimants do not have to supply any additional information other than contact information. (*Id.*, Ex. A.) Again, regardless of the claims rate, no money will revert to Defendant. (*Id.*, ¶ 25.) Thus, the entire settlement fund shall be distributed to Settlement Class Members.[5]

The amounts distributed via credit and/or check shall be divided in a manner proportionate to each Settlement Class Member's damages, as determined by Class Counsel based on data produced by Defendant. (*Id.*, ¶¶ 30-32.) To explain, prior to mediation, Defendant produced to Plaintiff the Rehab Data Spreadsheet, which showed that total collection costs imposed on Settlement Class Members equals $119,081,845.60. (Hurt Decl., ¶ 9.) This data was confirmed by Defendant through a signed and sworn declaration of Daniel Hurt, who was a Manager of Corporate Finance for Defendant from 2000 to 2016. (*See generally* Hurt Decl.) The $119,081,845.60 is referred to as "Aggregate Base Damages" in the parties' settlement agreement. (Settlement Agreement, ¶ 13.) Each Settlement Class Member's total collection costs, as listed on the Rehab Data Spreadsheet and confirmed by Mr. Hurt's declaration, is

[5] Should any funds remain after the close of the check negotiation period for Group D Loans, the funds will be donated to the parties' designated *Cy Pres* Recipient, Economic Mobility Pathways (or "EMPath"). (*Id.* ¶¶ 20, 53.) EMPath is a national non-profit organization dedicated to guiding low-income families toward economic independence in a variety of ways, including related to student loans. (Declaration of Persis S. Yu ("Yu Decl."), ¶ 6.) *See also* https://www.empathways.org/ (last accessed Jan. 19. 2017). EMPath's groundbreaking research and practices have been used as a blueprint for local, state, and national non-profits and government institutions serving low-income and homeless individuals and families. (Yu Decl., ¶ 7.) Among other things, EMPath offers its participants meaningful financial counseling and assistance in accessing higher education. (*Id.*, ¶¶ 8-9.) Through these programs, it assists participants deal with their student loan debt to either regain eligibility for Title IV funds or improve their financial stability. (*Id.*, ¶ 9.)

referred to as "Individual Loan-Level Base Damages" in the parties' settlement agreement. (*Id.*, ¶ 30.) Thus, the "Individual Loan-Level Settlement Percentage" means the percentage realized when the Individual Loan-Level Base Damages of each Settlement Class Member who has not excluded himself or failed to submit a claim form if required is the numerator and is divided by the denominator of the Aggregate Base Damages. (*Id.*, ¶ 32.) Each Settlement Class Member will receive through credit(s) and/or a check the amount realized by multiplying each Individual Loan-Level Settlement Percentage by the Net Settlement Fund. (*Id.*, ¶¶ 31, 49.)

As to non-monetary relief, the parties note that by July 31, 2015, absent subsequent default, Defendant stopped imposing collection costs on borrowers who defaulted for the first time, agreed to rehabilitation within sixty (60) days, and who made the required nine payments within ten consecutive months. (Hurt Decl., ¶ 6; Settlement Agreement, ¶ 46.) Specifically, as a term of settlement, Defendant has agreed that, absent subsequent default or failure to make required payments, Defendant will not impose collection costs on first-time defaulted student loan borrowers who enter into rehabilitation agreements within sixty (60) days of receiving notice of default, and who comply with those agreements, unless and until such time as any court of competent jurisdiction or administrative agency issues a ruling or opinion directly or indirectly authorizing the collection costs at issue in this case, or the Department amends, reverses, or modifies its position as stated in the amicus brief filed in the appeal in this case. (Settlement Agreement, ¶ 47.)

B. Notice to the Class

After soliciting bids from a number of administrators, the parties have jointly selected Dahl Administration, LLC, an independent third party, to serve as the Settlement Administrator. (*Id.* ¶ 42.) The Settlement Administrator will handle mailing notice, website set-up and administration, claims processing, mailing settlement payments, and other administrative tasks. The reasonable expenses of the Settlement Administrator, which are anticipated to be less than $50,887, will be paid from the common fund of $23,000,000. (*Id.* ¶¶ 25, 35, 53.)

The parties seek Court approval of the content of the forms of notice attached to the settlement agreement as Exhibits A-C and permission to have them delivered to class members. As explained below, this notice program meets the requirements of Fed. R. Civ. P. 23(c)(2)(B) for "individual notice to class members who can be identified through reasonable effort."

First, all Settlement Class Members will be sent a Postcard Notice. (Settlement Agreement, Exs. A-B.) The Postcard Notice sent to Settlement Class Members with Group D Loans will also include a postage pre-paid claim form which can be detached, completed, and returned. (*Id.*, Ex. A.) The Postcard Notice will inform Settlement Class Members of basic information about the Settlement and how to obtain additional information about the Settlement, including the URL for the Settlement Website and a toll-free telephone number to contact Class Counsel with any questions about the Settlement. (*Id.*, Exs. A-B.)

The Postcard Notice and Claim Form (if applicable) will be mailed via first class U.S. mail, to each Settlement Class Member's last known address for Class Members with loans in Groups A-C and, for Class Members with loans in Group D and no other group, to each Settlement Class Member's last known address as updated by the U.S. Postal Service's National Change of Address System and any other appropriate proprietary software the Settlement Administrator utilizes. (*Id.* ¶¶ 57-59.) Should any notice be returned as undeliverable or returned with a forwarding address, the Administrator shall promptly re-mail to the forwarding address, or if none, will utilize appropriate databases to find a new address and re-mail, if possible. (*Id.*, ¶ 60.)

The Settlement Website shall either be maintained by the Settlement Administrator or Class Counsel in consultation with the Settlement Administrator. (*Id.* ¶ 45.) The Long Form Notice with a fuller explanation of the settlement (*see* Settlement Agreement, Ex. C) will be posted on the website, along with copies of relevant pleadings, such as the FAC, the settlement agreement, copies of any orders issued by the Court in connection with the settlement, and Class Counsel's forthcoming fee petition. (Settlement Agreement, ¶ 61.) The website will also provide Settlement Class Members an opportunity to update their contact information as necessary. (*Id.*, ¶ 61(ii).) The website itself will be updated on a regular basis throughout the settlement process. (*Id.*, ¶ 61(vi).) Class Counsel will also maintain a toll-free telephone number for questions related to the settlement. (*Id.*, ¶ 62.) Additionally, working in conjunction with the Settlement Administrator, Defendant will comply with the notice requirements of the Class Action Fairness Act of 2005, 28 U.S.C. § 1715(b), by providing notice of the settlement to appropriate state officials for each state in which a Named Plaintiff or Settlement Class Member resides, and to the U.S. Attorney General for each such state, within 10 days of filing of this Memorandum. (*Id.*, ¶ 70.)

These efforts to provide notice to the Settlement Class are "the best notice that is practicable under the circumstances." Fed. R. Civ. P 23(c)(2)(B).

C. Opt-Outs and Objections

The Postcard Notice and the Long Form Notice will also inform all Settlement Class Members of their right to exclude themselves from or object to the Settlement and of the associated sixty (60) day deadline to do so. (Settlement Agreement, Exs. A-C.) Settlement Class Members who choose to exclude themselves must send a written notice to the Settlement Administrator stating the individual's name and address and desire to exclude himself from the

Settlement. (*Id.*, ¶ 64.) To object, a Settlement Class Members must file a statement of objection with the Clerk of Court and mail a copy to the Settlement Administrator. (*Id.*, ¶ 65.) The statement must state the case name and number; list the class member's name, address, phone, and email information; state the basis and explanation of the objection; be signed by the Settlement Class Member; and state whether the Settlement Class Member intends to appear at the final approval hearing, with or without counsel. (*Id.*)

D. Attorneys' Fees, Costs, and Named Plaintiff Service Awards

The Settlement Agreement contemplates Class Counsel petitioning the Court for attorneys' fees in an amount not to exceed one-third of the settlement fund, as well as documented, customary litigation expenses incurred by Class Counsel. (*Id.*, ¶ 52.) Class Counsel may also petition the Court for $5,000 as a service payment for the Named Plaintiff. (*Id.*, ¶ 51.) Any approved awards will be deducted from the settlement fund prior to distribution to the Settlement Class Members. (*Id.*, ¶ 35.) Class Counsel will formally petition the Court for these amounts no later than fourteen (14) days prior to the exclusion and objection deadline and will post a copy of the motion papers on the settlement website so that Settlement Class Members are able to review them prior to the deadline to opt out or object to the settlement. (*Id.*, ¶ 71.) Neither final approval, nor the size of the settlement fund, are contingent upon the full amount of any requested fees or service awards being approved. (*Id.* ¶¶ 51-52.)

The above-described settlement is within the "range of possible approval," and is sufficiently fair, reasonable and adequate to warrant dissemination of notice apprising Settlement Class Members of the proposed Settlement and to establish procedures for a final settlement hearing under Rule 23(e). William B. Rubenstein, *Newberg on Class Actions* §13.13 (5th ed. 2015).

Accordingly, and as discussed in more detail below, the parties respectfully request that the Court grant preliminary settlement approval.

ARGUMENT

Class action settlements must be approved by the court if, after a fairness hearing is held, the court finds that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). The purpose of preliminary approval is "to prepare the way for a fairness hearing," *In re Bromine Antitrust Litig.*, 203 F.R.D. 403, 416 (S.D. Ind. 2001), by "ascertain[ing] whether there is any reason to notify the class members of the proposed settlement and to proceed with a fairness hearing." *Armstrong v. Bd. of School Dirs. of Milwaukee*, 616 F.2d 305, 314 (7th Cir. 1980), *overruled on other grounds by Felzen v. Andreas*, 134 F.3d 873, 875 (7th Cir. 1998).

For the reasons set forth below, the Court should: (1) preliminarily approve the parties' proposed Settlement, (2) certify the Settlement Class for settlement purposes only, (3) approve the class notices for distribution, (4) appoint Plaintiff as Class Representative and Plaintiff's counsel as Class Counsel, and (5) set a date for the final approval hearing.

I. PRELIMINARY APPROVAL OF THE SETTLEMENT SHOULD BE GRANTED BECAUSE THE TERMS ARE FAIR, REASONABLE, AND ADEQUATE

There is a "general policy favoring voluntary settlements of class action disputes." *E.E.O.C. v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 888-89 (7th Cir. 1985). A settlement should thus be preliminarily approved as long as "the proposed settlement is lawful, fair, reasonable, and adequate." *Uhl v. Thoroughbred Tech. & Telecomms., Inc.*, No. IP00-1232-C-B/S, 2001 WL 987840, at *10 (S.D. Ind. Aug. 28, 2001) (quoting *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996)).

At the preliminary approval stage, "[a]ll that is required . . . in order to progress to the fairness hearing is that the proposed settlement be 'within the range of possible approval,'" *In re*

Bromine Antitrust Litig., 203 F.R.D. at 416 (quoting *In re Gen. Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1124 (7th Cir. 1979)); however, "[b]oth the substance and also the procedure of the settlement require investigation before preliminary approval can be granted." *Id*. In other words, if "[b]ased on the range of possible outcomes and the cost, delay, and uncertainty associated with further litigation, the Court finds that the Settlement is within the range of possible approval," then preliminary approval should be granted. *Lace v. Fortis Plastics LLC*, No. 3:12-CV-363 JD, 2015 WL 1383806 (N.D. Ind. Mar. 24, 2015). In the event a court finds that the settlement falls within the range of possible approval, notice is issued and a final approval hearing scheduled. Rubenstein, *supra*, § 13:10.

After notice is issued, at final approval, a court may consider several factors: (1) "a comparison of the strengths of plaintiffs' case versus the amount of the settlement offer;" (2) "the likely complexity, length, and expense of the litigation;" (3) "the amount of opposition to the settlement among affected parties;" (4) "the opinion of competent counsel;" (5) "the stage of the proceedings and the amount of discovery already undertaken at the time of the settlement." *Hiram Walker*, 768 F.2d at 889 (quoting *Gautreaux v. Pierce*, 690 F.2d 616, 631 (7th Cir. 1982)). The court considers all of these factors "in their entirety to assess fairness." *Heekin v. Anthem, Inc.*, No. 1:05-cv-01908-TWP-TAB, 2012 WL 5472087, at *2 (S.D. Ind. Nov. 9, 2012) (citing *Isby*, 75 F.3d at 1199). While consideration of these factors is not required at preliminary approval, each factor that can be evaluated now weighs strongly in favor of settlement approval.[6]

A. The Proposed Settlement Was Reached After Exchange of Substantial Information, Motion Practice, and Arms-Length Negotiations Between Experienced Counsel.

As laid out *supra*, this case has been vigorously litigated over a span of more than three years. The parties engaged in informal and formal discovery, briefed Defendant's Motion to Dismiss, including a Seventh Circuit appeal, petition for rehearing, and a petition for certiorari to the United States Supreme Court, exchanged comprehensive data regarding Settlement Class Members and Loans At Issue, exchanged detailed mediation briefs, and attended a mediation session with U.S. District Court Judge (ret.) Wayne Anderson, a highly experienced and respected third-party neutral, before this settlement was reached. These circumstances warrant the presumption of fairness as to this settlement. *See* *Fritzinger v. Angie's List, Inc.*, No. 1:12-cv-01118-JMS-DML, 2014 WL 4680898, at *3 (S.D. Ind. Sept. 22, 2014) ("That this Settlement resulted from a hotly contested mediation, which was overseen by a very well-respected mediator, weighs in favor of finding the Settlement fair, reasonable, and adequate."); *Great Neck Capital Appreciation Inv. P'ship, L.P. v. PricewaterhouseCoopers, L.L.P.*, 212 F.R.D. 400, 410 (E.D. Wis. 2002) (finding that a settlement agreement is entitled to "a strong presumption of fairness" when it results from "arms-length negotiations by competent counsel" and the involvement of "an experienced mediator."); *Bert v. AK Steel Corp.*, No. 1:02-CV-467, 2008 WL 4693747, at *2 (S.D. Ohio Oct. 23, 2008) ("The participation of an independent mediator in settlement negotiations virtually insures that the negotiations were conducted at arm's length and without collusion between the parties."). Additionally, the parties warrant that, throughout mediation, they were negotiating the amount of a common fund and that any fees and costs to be paid from that fund to Class Counsel were not discussed until after the amount of the common fund (i.e., the Gross Settlement Amount) and method of distribution (i.e., pro rata) to Settlement Class Members had been agreed upon. Importantly, should the Court decline to approve any requested payment, or reduce such payment, the settlement shall still be effective. (Settlement Agreement, ¶¶ 51-52.)

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[6] Because notice has not yet been provided to the class, the third factor, which considers class members' reaction to the settlement, cannot be evaluated until final approval.

B. The Settlement Is Well Within the Range of Approval.

In determining an appropriate recovery in a class action settlement, courts consider "the strength of plaintiff's case on the merits balanced against the amount offered in the settlement." *In re AT & T Mobility Wireless Data Servs. Sales Litig. (In re AT & T I)*, 270 F.R.D. 330, 346-47 (N.D. Ill. 2010) (quoting *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006)). To undergo this analysis, the court should look to "the net expected value of continued litigation to the class." *Id*. (quoting *Synfuel*, 463 F.3d at 653). However, the court must also consider the risks associated with continuing with the litigation, including the risk to Plaintiff that the case will ultimately be unsuccessful. *See id*. ("[A]n integral part of the strength of a case on the merits is a consideration of the various risks and costs that accompany continuation of the litigation." (quoting *Donovan v. Estate of Fitzsimmons*, 778 F.2d 298, 309 (7th Cir. 1985))). The proposed settlement is impressive when considering the range of possible recoveries for the Settlement Class, Defendant's potential defenses, and the number of procedural hurdles between the Named Plaintiff and a final judgment.

1. The Substantial Risks of Continued Litigation Support the Settlement.

Following the Seventh Circuit's directive, a court begins its analysis of the settlement value by "quantifying the net expected value of continued litigation to the class." *Synfuel*, 463 F.3d at 653 (quoting *Reynolds v. Beneficial National Bank*, 288 F.3d 277, 284-85 (7th Cir. 2002)). The Plaintiff filed this case seeking damages on behalf of herself and similarly situated borrowers for causes of action related to Defendant's allegedly improper imposition of collection costs on borrowers' student loan accounts. According to data produced and verified by Defendant, a total of $119,081,845.60 in collection costs has been imposed on Settlement Class Members in connection with the Loans At Issue in this litigation during the class period. (Hurt Decl. ¶ 9.) This is the upper range of what the class could expect to recover as actual damages through a successful trial.[7]

Having established the maximum compensatory damages, the next step in the analysis is to evaluate the strength of Plaintiff's case in order "to discount the value of the class's claims based on the various defenses available to the defendant." *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 579 (N.D. Ill. 2011) (citing *Synfuel*, 463 F.3d at 653). Here, the Named Plaintiff faces substantial risks of continuing the litigation. Despite the fact that the parties have been litigating for years, the Named Plaintiff has yet to move for and prevail at class certification and summary judgment. While the Named Plaintiff is confident that she could meet her burden at each of those steps, each of these phases of litigation presents serious risks, which the settlement allows the Named Plaintiff to avoid. *See e.g.*, *In Re Painewebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 126 (S.D.N.Y. 1997) ("Litigation inherently involves risks.").

In addition to the generalized uncertainty surrounding all litigation, the Named Plaintiff also faces the specific risk in this case of an adverse ruling in *United Student Aid Funds, Inc. v. King*, Case No. 15-cv-01137 (D.D.C., filed July 16, 2015). In that case, USAF challenged the Department's interpretation of its regulations at issue in this case, and asked the court to have the Dear Colleague Letter vacated as "invalid, unenforceable, and contrary to law." 2016 WL

[7] While Plaintiff did seek additional punitive damages via her RICO claim, "[p]unitive damages are generally not appropriate in measuring the fairness of a proposed class action settlement." *Mangone v. First USA Bank*, 206 F.R.D. 222, 229-30 (S.D. Ill. 2001), *citing* *Duhaime v. John Hancock Mut. Life Ins. Co.*, 177 F.R.D. 54, 70 (D. Mass. 1997) ("the fact that [the defendant] is not 'sufficiently punished' is not itself a reason for finding the settlement unfair"); *In re American Family Enterps.*, No. 99-41774(RG), 256 B.R. 377, 424-25 (D.N.J.2000) (punitive recovery "should not be superimposed as a yardstick for measuring the adequacy of a settlement, lest the settlement negotiation process be derailed before leaving the station" (quoting *In re Dennis Greenman Sec. Litig.*, 622 F. Supp. 1430, 1441 (S.D. Fla. 1985), *rev'd on other grounds*, 829 F.2d 1539 (11th Cir. 1987))). Nor should treble damages be used in measuring a settlement's fairness. *See* *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 459 (2d Cir. 1974), *abrogated on other grounds by* *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000); *In re Dennis Greenman*, 622 F. Supp. at 1441.

4179849, at *2 (D.D.C. Aug. 5, 2016). The court in that case denied the Department's motion to dismiss and identified the issue in the litigation as whether the Department issued a "new rule" which would "require[] the Department to have acknowledged its changed position and to have provided a good reason for the change." *Id*. While no decision has been made on the merits in *USAF v. King*, a ruling against the Department in that case could, if appealed, eventually create a circuit split which, if heard by the Supreme Court, may undermine Plaintiff's victory at the Seventh Circuit in this case. Moreover, even absent, or prior to, any appeal in the *King* case, Defendant contends that invalidation by that district court of the Dear Colleague Letter as void might well have an immediate effect on liability determinations in this case. Given Defendant's position that a predicate of the Seventh Circuit's decision will have been superseded by subsequent facts and developments should such a ruling ensue in the *King* case, significant potential hurdles to any recovery at all for the Named Plaintiff may be presented by continued litigation.

Plaintiff also faces risk in the form of Defendant's assertion of numerous affirmative defenses, such as the voluntary payment doctrine, waiver, estoppel, and setoff and recoupment. The voluntary payment doctrine, for example, precludes the recovery of moneys that were voluntarily paid even if "not legally due." *See Time Warner Entm't Co. L.P. v. Whiteman*, 802 N.E. 2d 886, 889-90 (Ind. 2004). This could present a hurdle to recovery, and while Plaintiff believes that Defendant's arguments could be overcome, at present, the applicability of the voluntary payment doctrine in this case is an open question, which weighs in favor of settlement approval. *See Schulte*, 805 F. Supp. 2d at 582 (considering defendant's contract-based defenses, including the voluntary payment doctrine, and holding, "[a]bsent settlement, [c]lass [m]embers would face the real risk that they would win little or no recovery" and, accordingly, "the use of a significant discount percentage is appropriate”). In short, while “the uncertain nature of the legal issues implicated by proceeding to trial makes it difficult to calculate a precise probability of success,” the court must weigh these factors in determining the appropriateness of the settlement recovery. *In re AT & T Mobility Wireless Data Servs. Sales Tax Litig.*, 789 F. Supp. 2d 935, 963 (N.D. Ill. 2011). Here, they weigh in favor of approval.

2. The Recovery is Substantial and Well Within the Range for Approval.

Here, the gross settlement amount of $23,000,000 is substantial and is nearly 20% of the collection costs that Plaintiff alleges were wrongly imposed on Settlement Class Members. The non-monetary benefits of the settlement are also significant. As a result of this litigation, Defendant has already ceased its practice of imposing collection costs on loan accounts where the borrower has timely rehabilitated the loan and, should this settlement be approved, absent subsequent loan default by borrowers or failure to make required payments, Defendant will not impose collection costs on first-time defaulted student loan borrowers who enter into rehabilitation agreements within sixty (60) days of receiving notice of default, and who comply with those agreements, unless and until such time as any court of competent jurisdiction or administrative agency issues a ruling or opinion directly or indirectly authorizing the collection costs at issue in this case, or the Department amends, reverses, or modifies its position as stated in the amicus brief filed in the appeal in this case. (Settlement Agreement, ¶ 47.)

The settlement also protects Settlement Class Members from the potential risk that their case will be adversely impacted by a ruling in *USAF v. King*. Furthermore, the settlement provides immediate benefits while “[c]ontinued litigation carries with it a decrease in the time value of money, for ‘[t]o most people, a dollar today is worth a great deal more than a dollar ten years from now.’” *In re AT & T I*, 270 F.R.D. at 347 (quoting *Reynolds*, 288 F.3d at 284).

Here, apart from considerations of the time value of money and the added benefits of the non-monetary relief, the settlement provides for a recovery of nearly 20% of actual damages.[8] This recovery percentage greatly exceeds the percentage recovered in other class action settlements that have garnered approval. When compared with other class action settlements resolving claims for actual damages, the proposed settlement falls well within the range for approval. For example, in *Schulte*, the parties settled the claims of a class of bank account holders who allegedly were subject to improper overdraft fees. 805 F. Supp. 2d at 565. The settlement in that case consisted of a $9.5 million common fund with attorneys' fees and costs, settlement costs, and class representative awards to be paid out of the fund. *Id.* at 568. At final approval the parties had submitted evidence estimating the total damages to the settlement class members at between $95.2 and $97.7 million. *Id.* at 579. The court calculated that the proposed settlement amounted to a recovery of around 10% of actual damages, and found that this percentage was well within the acceptable range for settlement approval. *Id.* at 583; *see also In re Newbridge Networks Sec. Litig.*, 1998 WL 765724, at *2 (D.D.C. Oct. 23, 1998) ("Courts have not identified a precise numerical range within which a settlement must fall in order to be deemed reasonable; but an agreement that secures roughly six to twelve percent of a *potential* trial recovery, while preventing further expenditures and delays and eliminating the risk that no recovery at all win be won, seems to be within the targeted range of reasonableness."); *City of Detroit v. Grinnell*, 495 F.2d at 455 n.2 ("[T]here is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery."); *In re Initial Public Offerings Sec. Litig.*, 671 F. Supp. 2d 467, 483-85 (S.D.N.Y. 2009) (approving a settlement providing only 2% of plaintiffs' maximum

[8] Using Defendant's estimated total compensatory damages of $119,081,845.60 and the settlement fund value of $23,000,000, the estimated recovery is 19.31% of actual damages.

possible recovery); *Nichols v. SmithKline Beecham Corp.*, No. Civ.A.00-6222, 2005 WL 950616, at *16 (D. Mass. Apr. 22, 2005) (approving settlement totaling between 9.3% and 13.9% of the potential recovery); *In re Cendant Corp. Sec. Litig.*, 109 F. Supp. 2d 235, 263-64 (D.N.J. 2000) (citing settlements approved in amounts between 1.6% and 10% of damages); *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 324-25 (N.D. Ga. 1993) (approving settlement with a recovery of between 12.7% and 15.3% of damages); *Behrens v. Wometco Enters.*, 118 F.R.D. 534, 542 (S.D. Fla. 1988), *aff'd*, 899 F.2d 21 (11th Cir. 1990) (affirming the approval of a settlement of roughly 6% of damages and holding that such settlement "is not indicative of an inadequate compromise").

Further, in many of these approved settlements, including *Schulte*, ***all*** class members were required to submit a claim form in order to participate in the settlement fund. Here, the Settlement Class Members will automatically receive payment for the vast majority of Loans At Issue without the use of a claim form. Indeed, only approximately 1,100 of the 90,000 loans are Group D loans for which a claim form will be required and then, too, solely for the purpose of verifying Class Members' identities and addresses which may not be known to Defendant or third party lenders.[9] (Prakash Decl. ¶ 14.)

Taken together and viewed in light of the substantial risks of continued litigation,

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[9] This requirement is appropriate. Indeed, given that the class period begins more than nine years ago, the use of a claim form for Group D Loans will help to ensure that Settlement Class Members who are sent checks will actually receive and cash them. The claims process in this case was designed to be as claimant-friendly as possible, is not onerous, and presents no meaningful bar to the making of a claim. No information regarding the loans or collection costs need be supplied by the class member, just a verification of identity and address. Claim forms are commonly used to distribute settlement proceeds in class actions, and are routinely approved. *See, e.g.*, *Shames v. Hertz Corp.*, No. 07-CV-2174-MMA(WMC), 2012 WL 5392159, at *9 (S.D. Cal. Nov. 5, 2012) ("[C]lass action settlements often include this [claims] process, and courts routinely approve claims[-]made settlements."). And, as stated above, the entire common fund will be distributed regardless of the claims rate.

Defendant's cessation of the challenged practice, the gross recovery, the estimated recovery percentage per class member, and the method of distributing the settlement proceeds are all fair and reasonable and warrant preliminary settlement approval.

C. Absent Settlement, the Parties Face Expensive and Time Consuming Litigation

As noted above, despite the fact that the parties have been litigating this case for years, the case only recently advanced past the pleadings phase. Because of this, absent settlement, both parties would be facing years of potential litigation, including additional discovery, motion practice (including summary judgment and class certification), and trial. While the outcome of this litigation would be uncertain, there is no doubt that it would be time consuming and expensive for all parties involved. The parties' settlement avoids this delay and provides class members immediate monetary relief. This, too, weighs in support of approval.

D. The Opinion of Counsel Weighs in Favor of Approval

The parties here are represented by counsel who have significant experience in class action litigation and settlements. (*See* Part II.A.4, *infra*.) Class Counsel and the Named Plaintiff support the settlement, and that determination is entitled to deference. *See* *Armstrong*, 616 F.2d at 315 ("Because settlement of a class action, like settlement of any litigation, is basically a bargained exchange between the litigants, the judiciary's role is properly limited to the minimum necessary to protect the interests of the class and the public. Judges should not substitute their own judgment as to optimal settlement terms for the judgment of the litigants and their counsel."); *Uhl*, 2001 WL 987840, at *10 ("The Seventh Circuit has cautioned district courts against substituting their own judgment for that of the parties as to the terms of the settlement.").

E. The State of the Proceedings Weighs in Favor of Approval

The parties have conducted meaningful formal and informal discovery, allowing Plaintiff to know, before negotiating settlement, the precise amount of each class member's alleged damages. Additionally, most of the key legal points of this case have been argued and briefed many times (before this Court on the motion to dismiss, before the Seventh Circuit on appeal, before the Supreme Court with respect to Defendant's petition for certiorari). This has given the parties an acute awareness of the strengths and weaknesses of their positions, and an appreciation of the risks of further litigation. The investigation that the parties have done into both the facts and the law in this case weighs strongly in favor of approval.

For all of these reasons, the parties' settlement meets Rule 23's requirement that it be fair, reasonable, and adequate.

II. CERTIFICATION OF THE SETTLEMENT CLASS IS APPROPRIATE

Fed. R. Civ. P. 23 allows a court to certify a class conditionally or provisionally, for purposes of effectuating a settlement. *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liability Litig.*, 55 F.3d 768, 793-94 (3d Cir. 1995). To certify a class, the court must find that the prerequisites of Rule 23(a) are met, and that the case falls within at least one of the categories listed in Rule 23(b). The same standards generally apply where certification is sought for settlement purposes only, although issues of manageability at trial are not relevant.[10] *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

A. The Requirements of Federal Rule of Civil Procedure 23(a) Are Satisfied.

Under Rule 23(a), one or more persons may sue as representative parties on behalf of a class if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will

[10] Defendant has agreed that certification of the Settlement Class is proper for purposes of settlement only. (*See* Settlement Agreement, ¶ 66.)

fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a). Here, the requirements of Rule 23(a) are satisfied.

1. The Requirement of Numerosity Is Met.

The numerosity requirement is met if "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "Although there is no 'magic number' for numerosity purposes, joinder is considered impractical when a class numbers at least forty members." *Walker v. Calusa Investments, LLC*, 244 F.R.D. 502, 506 (S.D. Ind. 2007) (citing *Swanson v. Am. Consumer Indus.*, 415 F.2d 1326, 1333 (7th Cir.1969)). Defendant has determined that there are 35,516 Settlement Class Members. This satisfies the numerosity requirement.

2. The Class Meets the Commonality Requirement of Rule 23(a)(2).

A class meets the commonality prerequisite if "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury," and that their common complaint "is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349-50 (2011) (internal quotations and citations omitted). Thus, commonality requires that the claims of the plaintiff and those of the class arise from "a common nucleus of operative facts." *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992). "[T]his requirement is satisfied as long as 'the class claims arise out of same legal or remedial theory.'" *In re Bromine Antitrust Litig.*, 203 F.R.D. at 408 (quoting *Hubler Chevrolet, Inc. v. Gen. Motors Corp.*, 193 F.R.D. 574, 577 (S.D. Ind. 2000)). Here, all members of the Settlement Class claim to have suffered damages due to Defendant's alleged common practice of imposing collection costs upon borrowers who agreed to rehabilitation within the sixty (60) day window and made all required payments necessary to rehabilitate. And, the litigation thus far, especially at the appellate level, focused on a number of questions which were common to the class, including but not limited to:

- Whether the language of the form contracts at issue incorporates the relevant statutes and regulations;
- Whether the regulations at issue bar the imposition of collection costs on borrowers who promptly agree to rehabilitate;
- Whether deference to the Department's interpretation of the regulations at issue is appropriate; and
- Whether there is a private right of action for the breach of the MPN.

The resolution of all of these questions, and more, affects the claims of all class members. Because of this, the commonality prong of Rule 23 is satisfied.

3. The Class Representative's Claim is Typical of the Class Claims.

The typicality requirement is met if "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3); *see* *In re Bromine Litig.*, 203 F.R.D. at 409 ("This requirement is satisfied where the named plaintiffs' claims 'arise[] from the same … practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory.") (quoting *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983)). The typicality requirement is construed liberally. *Keele v. Wexler*, 149 F.3d 589, 595 (7th Cir. 1998).

Here, Plaintiff's claim is typical of the claims of absent class members because it arose from a similar set of alleged facts. That is, Plaintiff claims that, like all members of the class, she was charged collection costs despite having timely entered into a rehabilitation agreement and having made all payments required to rehabilitate her loan. *De La Fuente*, 713 F. 2d at 232 (finding typicality where "[a]ll members of the class were subject to the same allegedly unlawful practices" and "[t]he practices complained of remained essentially unchanged throughout the years in question.") The typicality requirement, therefore, is met here.

4. Plaintiff and Her Counsel Are Adequate Representatives.

Under Rule 23(a)(4), the representative party must "fairly and adequately protect the interests of the class." This requirement applies to both the class representative and her counsel.

Plaintiff's counsel's representation in this matter makes clear their qualifications to be appointed class counsel. Counsel has zealously pursued this case for years, including taking a successful appeal to the Seventh Circuit, and successfully opposing Defendant's motion for certiorari to the Supreme Court. Furthermore, Counsel and their firms are well qualified for the position.

Over the course of its forty-two year history, Nichols Kaster, PLLP ("Nichols Kaster") has developed a sterling reputation in the legal community for representing consumers. (Nichols Kaster Firm Resume, Prakash Decl. Ex. 2.) The firm has been lead or co-counsel on hundreds of class and collective actions and frequently achieves class certification in both litigation and settlement contexts. (*Id.*) At present, the firm has more than thirty attorneys dedicated to protecting and advancing plaintiffs' rights, four of whom work almost exclusively on class-wide litigation. (*Id.*) In fact, the firm has initiated more than 140 consumer cases in the last six years, and is currently prosecuting numerous class actions on behalf of consumers across the country. (*Id.*)

Berger & Montague ("Berger") was founded in 1970, and has been concentrated on representing plaintiffs in complex class actions ever since. (Berger Firm Resume, Prakash Decl. Ex. 3.) The firm has been recognized by courts for its skill and experience in handling major complex litigation. (*Id.*) Berger has been recognized by the National Law Journal in 11 of the last 15 years for its "Hot List" of top plaintiffs' oriented litigation firms in the nation. (*Id.*)

The National Consumer Law Center ("NCLC") is a non-profit consumer law firm that, since 1969, has used its expertise to work for consumer justice and economic security for low-income and other disadvantaged people. (Declaration of Charles M. Delbaum ("Delbaum Decl."), ¶ 5.) NCLC's expertise includes class action litigation, policy analysis and advocacy; consumer law publications; expert witness services, and training and advice for advocates. (*Id.*) NCLC is author of the widely used *Consumer Credit and Sales Legal Practice Series*. (*Id.*) Its senior litigators, Stuart Rossman and Charles Delbaum, have been actively involved in this litigation since February 2014, and have had the benefit of advice and research from Persis Yu, an attorney who specializes in student loan law and practices at NCLC. (*Id.*, ¶ 2.) Between them, Mr. Rossman and Mr. Delbaum have been appointed lead or co-counsel in over 75 certified consumer class actions. (Delbaum Decl., ¶ 8; Declaration of Stuart T. Rossman, ¶ 8.)

Plaintiff Bryana Bible is also well qualified to be a class representative. She actively participated in this litigation for years, including reviewing the pleadings, meeting with Counsel in person and via telephone many times, providing documents for use in litigation, and reviewing and approving the settlement agreement. (Prakash Decl., ¶ 15.) Throughout the case, Ms. Bible kept the best interests of the class members as her primary consideration, and the class members have benefited from her conduct in the case. (*Id.*) Importantly, Plaintiff's interests are not opposed to the interests of the absent members of the Settlement Class, and there is no conflict of interest between them. (*Id.*) *See* *Amchem Prods.*, 521 U.S. at 613 ("The adequacy inquiry under

Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent.”).

Accordingly, Rule 23’s adequacy requirement is met.

B. The Requirements of Rule 23(b)(3) are Also Satisfied.

If the elements of Rule 23(a) are satisfied, then a class action may be certified so long as the court finds that certain other requirements under Rule 23(b)(3) are met, including: (1) questions of law or fact common to class members predominate over any questions affecting only individual members; and (2) a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. Fed. R. Civ. P. 23(b)(3); *Amgen, Inc. v. Connecticut Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1196 (2013).

First, the “predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.” *Amchem Prods.*, 521 U.S. at 623. The predominance requirement is met here because the central issues in this litigation are common among class members (*i.e.*, whether the imposition of collection costs on borrowers who have entered into rehabilitation agreements is a breach of the borrowers’ loan agreements and a violation of the federal RICO Act) and there are no individual liability issues. Further, because Defendant has produced data for each individual class member showing the collection costs imposed with respect to each loan and has agreed to use those costs as a basis for calculating settlement allocations, the issue of damages calculation or any other individualized issue would not defeat the predominance of common questions.

Second, the superiority requirement ensures that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Here, common issues predominate among class members, and the legal issues have proved weighty and time-consuming, providing little incentive for individual lawsuits. The interests of the Settlement Class, Defendant, and judicial economy and efficiency are therefore best served by resolving this action on a class-wide basis. *See Scholes v. Stone, McGuire & Benjamin*, 143 F.R.D. 181 (N.D. Ill. 1992) (noting that a class action is superior to other methods of adjudication where judicial economy and efficiency, would be achieved through certification).

Accordingly, the parties request that the Settlement Class be provisionally certified for the purposes of settlement.

III. THE COURT SHOULD APPROVE DISSEMINATION OF THE CLASS NOTICES

Attached to the settlement agreement, the parties have submitted their proposed notices: the Postcard Notice, along with the Claim Form for Group D Loans, to be sent to all Settlement Class Members by first class mail, as well as the Long Form Notice to be posted on the Settlement Website. (Settlement Agreement, Exs. A-C.) These proposed notices include all of the information required by Fed. R. Civ. P. 23(c)(2)(B). The Postcard Notice informs Settlement Class Members of the terms of the settlement and their rights and deadlines in which to exercise them and, for loans in Group D, includes a detachable, postage pre-paid Claim Form. The Long Form Notice, which will be posted on the Settlement Website, and to which the Postcard Notice provides a link, contains details about the definition of the Settlement Class, the proposed Class Counsel, the size of the settlement fund, the methodology for opting out or objecting, the potential size of Class Counsel's request for attorneys' fees, costs, and the Named Plaintiff's service payment, and the date and location of the final approval hearing. Further, the Long Form Notice is modeled after the Federal Judicial Center's class action model notice. *See* www.fjc.gov. The notices certainly are "'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Int'l Union, United Auto., Aero., and Agr., Impl. Workers of Am. v. Gen. Motors Corp.*, 497 F.3d 615, 629 (6th Cir. 2007) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)); *see* Fed. R. Civ. P. 23(e)(1). As such, the Court should approve the notices for distribution to the Settlement Class.

CONCLUSION

Based on the foregoing, the parties respectfully request that the Court grant preliminary settlement approval of the parties' settlement, certify the Settlement Class for settlement purposes, approve the distribution of the parties' proposed notices, and schedule a final fairness hearing.

DATED: January 27, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2017, a copy of the foregoing was filed electronically. Service of this filing was made on all ECF-registered counsel by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

Date: January 27, 2017

/s/Anna P. Prakash
Anna P. Prakash